

# California Fair Political Practices Commission

## MEMORANDUM

**To:** Chairman Getman, Commissioners Downey, Knox, Scott, and Swanson  
**From:** Mark Krausse, Executive Director  
**Subject:** Proposed Amendments to Commission's Conflict-of-Interest Code  
**Date:** October 22, 2001

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### INTRODUCTION

The Commission has a conflict-of-interest code that is subject to the procedural and substantive requirements of the Political Reform Act (the "Act").<sup>1</sup> The conflict-of-interest code for the Commission is embodied in 2 Cal. Code of Regulations section 18351. In this memorandum, amendments to the code are presented for the Commission's consideration.

Government Code § 87306(a) requires every agency to submit amendments to its code<sup>2</sup> as necessary. The Commission must change its code to reflect changes in staff positions. The Commission's Legal Division has reviewed the proposed amendments.

### BACKGROUND

Gov't. Code § 87100 prohibits public officials from making governmental decisions in which they have a financial interest. An agency's conflict of interest code is a fundamental tool for carrying out this prohibition. Generally, a code must designate which employees will have a potential for a conflict of interest in making decisions, and set out requirements for these employees with regard to reporting of their economic interests in statements of economic interest (SEIs). (§ 87302.) The Commission (and any agency covered under the Act) has an obligation to make amendments to its code "when change is necessitated by changed circumstances." (§ 87306.) Review and preparation of the Commission's code is subject to the Administrative Procedure Act. (§ 87311.) Amendments to the Commission's code are treated in the same manner as other regulatory changes. However, these code amendments are not effective until they are submitted to the Attorney General's Office, the code reviewing body for the Commission. (§§ 82011(d), 87303.)

### LEGAL STANDARD FOR CONFLICT-OF-INTEREST CODES UNDER THE ACT

The standard of review by a code reviewing body is set forth in Gov't. Code § 87309 as follows:

No Conflict of Interest Code or amendment shall be approved by the code

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1. Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

2. The term "code" as used in this memo refers to an agency conflict-of-interest code.

reviewing body or upheld by a court if it:

- (a) Fails to provide reasonable assurance that all foreseeable potential conflict of interest situations will be disclosed or prevented;
- (b) Fails to provide to each affected person a clear and specific statement of his duties under the Code; or
- (c) Fails to adequately differentiate between designated employees with different powers and responsibilities.

In its *Alperin* opinion, the Commission held that subdivision (c) of § 87309 prohibits an agency from requiring disclosure of financial interests which may not foreseeably be affected materially by decisions of employees in their designated positions. (*In re Alperin* (1977) 3 FPPC Ops. 77.) Discussing § 87309 in the context of the competing interests of financial disclosure and employee privacy, the Commission stated:

This provision is intended to ensure, first, that a conflict of interest code require financial disclosure only from employees required to be designated by Section 87302(a) and, second, that a code relate disclosure to the specific duties of such designated employees. Thus, a code reviewing body would fail to fulfill its obligation under Section 87309(c) if it allowed designation of positions in a code which, to quote the language of Section 87302(a), do not entail the ‘making or participation in the making’ of governmental decisions. **It would be equally improper for a code reviewing body to require disclosure of interests which may not foreseeably be affected materially by decisions made or participated in by designated employees.** Such action would necessarily impose the same or similar disclosure requirements on persons with quite different responsibilities, and Section 87309(c) holds such a course to be impermissible. [Footnote omitted.]

We do not mean to suggest that a code reviewing body must adhere rigidly to all the definitions contained in the Act when it passes upon a conflict of interest code. In fact, in our capacity as code reviewing body, we have approved codes that deviated in certain respects from the Act's definitions of income and investments in order to ensure that the mandate of Section 87309(a), that all potential conflicts be disclosed, was met. [Footnote omitted.]

¶...¶

While our conclusion herein is based on an interpretation of the Act, we also are influenced by a concern that the right of privacy interests of public officials not be unduly invaded. [Footnote omitted.] The California Supreme Court has made it clear that although a properly drawn financial disclosure law

meets constitutional standards, overbreadth must be avoided and a statute will be invalid if it:

“... intrude[s] alike into the relevant and the irrelevant private financial affairs of the numerous public officials and employees covered by the statute and is not limited to only such holdings as might be affected by the duties or functions of a particular office.” (*County of Nevada v. MacMillen*, 11 Cal.3d 662, 671 (1974), quoting *City of Carmel-by-the Sea v. Young*, 2 Cal.3d 259, 272 (1970).)

The Political Reform Act was drafted to meet these constitutional standards, and in our role both as code reviewing body and as principal interpreter of the provisions of the Act, we have consistently sought to adhere to that objective. As code reviewing body under Section 82011(a), **we have required that agencies drafting codes scrutinize closely the duties, responsibilities and authority of each designated position in order to ensure that disclosure is specifically tailored and limited to those types of financial interests which "may foreseeably be affected materially by any decision made or participated in by the designated employee by virtue of his position."** (*In re Alperin* (1977) 3 FPPC Ops. 77.) [Emphasis added.]

The Commission has continued to advise that public agencies follow the specific tailoring directive in *Alperin* when drafting their codes. “[T]he Commission or any other code reviewing body may not approve an agency’s conflict of interest code if the code requires more disclosure than is required by the Act.” (*Hoffman* Advice Letter, No. A-98-084; see also *Marks* Advice Letter, No. A-98-073; *Rypinski* Advice Letter, No. I-90-513.)

The Commission must specifically tailor the financial disclosure requirements of its code to the financial interests of designated employees that may be affected materially by decisions of these employees.

## PROPOSED AMENDMENTS TO THE COMMISSION’S CODE<sup>3</sup>

### Additional Disclosure Categories

Using the *Alperin* standard, staff has examined the disclosure categories in the Commission’s code and the employee classifications assigned to them. Staff proposes an increase in the number of disclosure categories from 3 to 6 to allow for greater accuracy in correlating employee classifications with the appropriate level of disclosure, as determined by the type of decisions each is involved in and the

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3. The proposed amendments to the code are attached as Appendix A.

foreseeability of a material effect on a designated employee's financial interests. Generally, these additional disclosure categories are more specific variations of current categories 2 and 3. Category 1 remains the full disclosure category reserved for employee classifications with broad discretion to make decisions that may foreseeably have a material effect on any financial interest. The proposed disclosure categories are as follows:

**Category 1**

A designated employee in this category must report all investments, business positions, interests in real property, and sources of income.

**Category 2**

A designated employee in this category must report investments and business positions in business entities, and income from:

- A) Sources that are, or were, during the previous two years a “candidate,” “public official,” “committee,” “lobbyist,” “lobbying firm,” or “lobbyist employer” within the meaning of the Political Reform Act, or file periodic reports pursuant to Government Code sections 86114 and 86116;
- B) Attorneys of the type to represent persons described in subcategory A above; and
- C) Collection agencies or bureaus.

**Category 3**

A designated employee in this category must report investments and business positions in business entities, and income from:

- A) Sources that are, or were, during the previous two years a “candidate,” “public official,” “committee,” “lobbyist,” “lobbying firm,” or “lobbyist employer” within the meaning of the Political Reform Act, or file periodic reports pursuant to Government Code sections 86114 and 86116; and
- B) Attorneys of the type to represent persons described in subcategory A above.

**Category 4**

A designated employee in this category must report investments and business positions in business entities and income from sources that are of the type which, within the previous two years, has provided services, equipment, leased space, materials or supplies to the Fair Political Practices Commission.

**Category 5**

A designated employee in this category must report investments and business positions in business entities, and income from sources that manufacture, distribute, supply, or install computer hardware or software of the type utilized by the agency, as well as entities providing computer consultant services.

**Category 6**

A designated employee in this category must report investments and business positions in business entities, and income from sources that provide publication or printing services of the type utilized by the agency as well as sources that manufacture, distribute, supply, or install computer hardware or software of

the type utilized by the agency.

Recommendation: The Commission should adopt the amendments to the code establishing the additional disclosure categories as set forth above.

### **Placement of Employee Classifications in Appropriate Disclosure Categories**

An employee is designated in an agency's conflict of interest code "because the position entails the making or participation in the making of decisions which may foreseeably have a material effect on any financial interest." (§ 82019.) As discussed above, in placing employee classifications into particular disclosure categories, the Commission must tailor the level of disclosure to the decisions made by the employees and the foreseeability of a financial effect on an economic interest as result of the decisions. Staff has reviewed the duty statements for employee classifications (attached as Appendix B), and has consulted with management and supervisory personnel to assure the accuracy of these duty statements as reflections of decision-making responsibilities. Staff proposes assignment of employee classifications to the disclosure categories as follows:

EXECUTIVE OFFICE	DISCLOSURE CATEGORY
Executive Director	1
Media Director	3, 6
Associate Editor of Publications	6
Associate Information Systems Analyst	5
Political Reform Consultant	6
Executive Fellow	3
LEGAL DIVISION	
CEA (General Counsel)	1
FPPC Counsel/Supervisor (Assistant General Counsel)	1
FPPC Counsel	1
FPPC Counsel/Legislative Coordinator	1
Political Reform Consultant	3
Staff Services Analyst/Legal Analyst	4
ENFORCEMENT DIVISION	
CEA (Division Chief)	1
Chief Investigator	1
FPPC Counsel	2

Supervising Investigator	3
Investigator	3
Accounting Specialist	3
Political Reform Consultant	3
Associate Governmental Program Analyst	5

#### TECHNICAL ASSISTANCE DIVISION

CEA (Division Chief)	1
Staff Services Manager (Assistant Chief)	1
Staff Services Manager (Manager, Filing Officer Programs)	3
Political Reform Consultant	3
Staff Services Analyst	3

#### ADMINISTRATION DIVISION

CEA (Division Chief)	1
Data Processing Manager I	4, 5
Associate Personnel Analyst	4, 6
Associate Governmental Program Analyst/Staff Services Analyst (Budget Officer)	4

The positions of Media Intern, Graduate Legal Assistant, and Information Systems Technician have been deleted as designated positions under the code because they do not make decisions that may foreseeably affect a financial interest. (§ 82019.) Clerical and manual positions continue to be excluded.

Recommendation: The Commission should adopt the amendments to the code assigning employee classifications to the disclosure categories as set forth above.